Repco Holdings Sdn Bhd & Ors v Pengurusan Danaharta Nasional Bhd & Ors (No 1)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3-22-1007 OF 1999
ABDUL WAHAB J
16 AUGUST 1999

Civil Procedure *— Parties — Action against bank taken over by Pengurusan Danaharta Nasional Bhd — Appointment of special administrators over defendant bank — Whether plaintiffs could commence action in plaintiffs' name without prior written consent — Whether action should be struck out — Rules of the High Court 1980 O 15 r 6(1) & (2)*

Civil Procedure *— Pleadings — Striking out statement of claim — Appointment of special administrators over defendant bank under Pengurusan Danaharta Nasional Bhd Act 1998 — Whether plaintiffs could commence action in plaintiffs' name without prior written consent —Whether triable issues in face of factual disputes — Whether to strike out writ of summons and statement of claim — Rules of the High Court 1980 O 15 r 6(1), (2) & O 18 r 19*

The plaintiffs had taken considerable borrowings from Sime Bank Bhd ('the bank'). The assets of the bank were taken over by the first defendant under the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Act'). The first defendant appointed the second and third defendants as special administrators. The plaintiffs filed a writ of summons against the defendants for certain declarations, and various claims for damages, injunctions, interest and costs. The defendants filed their appearances to the writ and summonses in chambers ('the applications') to set aside the writ of summons under O 18 r 19 and O 15 r 6(2) of the Rules of the High Court 1980 and the inherent jurisdiction of the High Court. The O 18 r 19 applications were founded upon the argument that pursuant to s 33(1) of the Act, the directors of the plaintiffs could no longer, after the appointment of the special administrators, commence the action in the name of the plaintiff's without the latter's prior written consent, and the proceedings ought therefore be struck out. The learned senior assistant registrar heard and rejected the application. The defendants appealed.

Held, dismissing the appeal and the applications by the defendants:

(1) Since O 15 r 6(1) itself provides that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, it would be wrong to strike out the proceedings in this case under O 15 r 6(2). Thus, the objection that the directors of plaintiffs could no longer, after the appointment of the special administrators, commence this action in the name of the plaintiff's without the latter's prior written consent has no basis in view of the specific provision of O 15 r 6(1) (see p 632E–G).

(2) The writ of summons sought to be set aside was indorsed clearly with claims for declarations, damages, accounting and injunctions, interest and costs, founded upon assertions that statutory requirements and criteria have not been complied with for the actions of the first defendant and the appointments of the second and third defendants. There were allegations of bad faith and fraudulent exercise of power, as well as assertions of breach of arts 5(1) and 13 of the Federal Constitution. All of these were denied. There were clearly triable issues in the form of factual disputes and O18 r 19 cannot apply (see p 634B–C).

[Bahasa Malaysia summary

Plaintif-plaintif telah meminjam dengan banyak daripada Sime Bank Bhd ('bank tersebut'). Aset-aset bank tersebut diambil alih oleh defendan pertama di bawah Akta Pengurusan Danaharta Nasional Bhd 1998 ('Akta tersebut'). Defendan pertama telah melantik defendan kedua dan ketiga sebagai pentadbir khas. Plaintif-plaintif telah memfailkan writ saman terhadap defendan-defendan untuk beberapa deklarasi, dan tuntutan pelbagai yang lain untuk ganti rugi, injunksi-injunksi, faedah dan kos-kos. Defendan-defendan telah memfailkan kehadiran kepada writ dan saman dalam kamar ('permohonan tersebut') untuk mengetepikan writ saman di bawah A 18 k 19 dan A 15 k 6(2) Kaedah-Kaedah Mahkamah Tinggi 1980 dan bidang kuasa sedia ada mahkamah. Permohonan A 18 k 19 adalah berdasarkan hujahan bahawa menurut s 33(1) Akta tersebut, pengarah-pengarah plaintif tidak akan lagi, selepas perlantikan pentadbir khas, memulakan tindakan di atas nama plaintif tanpa kebenaran bertulis pentadbir khas tersebut, dan prosiding-prosiding patut diketepikan. Penolong kanan pendaftar telah mendengar dan menolak permohonan tersebut. Defendan-defendan telah merayu.

Diputuskan, menolak rayuan tersebut dan permohonan-permohonan oleh defendan-defendan:

(1) Oleh kerana A 15 k 6(1) sendiri memperuntukkan bahawa tiada tindakan atau perkara akan diketepikan atas alasan tersalah cantum atau ketakcantuman mana-mana pihak, adalah silap untuk mengketepikan prosiding di dalam kes ini di bawah A 15 k 6(2). Oleh itu, bantahan bahawa pengarah-pengarah plaintif tidak boleh lagi, selepas perlantikan pentadbir khas, memulakan tindakan ini di atas nama plaintif-plaintif tanpa mendapat kebenaran bertulis pentadbir khas tidak berasas memandangkan peruntukan spesifik A 15 k 6(1) (lihat ms 632E–G).

(2) Writ saman yang dipohon untuk diketepikan telah diindorskan dengan jelas dengan tuntutan untuk deklarasi, ganti rugi, akaun dan injunksi-injunksi, faedah dan kos-kos, berdasarkan kepada penegasan-penegasan bahawa keperluan-keperluan statutori dan

kriteria belum lagi dipatuhi untuk tindakan-tindakan defendan pertama dan perlantikan defendan kedua dan ketiga. Terdapat pengataan-pengataan niat jahat dan pelaksanaan kuasa secara frod, dan juga penegasan-penegasan keingkaran perkara 5(1) dan 13 Perlembagaan Persekutuan. Ini semua dinafikan. Ini dengan jelas adalah isu yang boleh dibicarakan di dalam bentuk pertikaian fakta dan A 18 k 19 tidak terpakai (lihat ms 634B–C).]

Notes

For cases on parties generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3228–3408.

For cases on striking out statement of claim, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3731–3777 and 4340–4345.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Bhd [1993] 3 MLJ 36 (refd)

Kho Ah Soon v Duniaga Sdn Bhd [1996] 2 MLJ 181 (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (refd)

Muniandy s/o Subrayan & Ors v The Chairman & Board Members of Koperasi Menara Maju Bhd [1997] 1 MLJ 557 (refd)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113 (refd)

Si & Si Sdn Bhd v Hazrabina Sdn Bhd [1996] 2 MLJ 509 (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 84

Federal Constitution arts 5(1), 13

Pengurusan Danaharta Nasional Bhd Act 1998 ss 21, 24, 33(1)

Rules of the High Court 1980 O 15 r 6(2), O 18 r 19(1)(a), (2), O 56 r 1, O 92 r 4

S Suhendran (*N Navaratnam, Ranjit Singh, HL Ooi* with him) (*Ranjit Ooi & Robert Low*) for the plaintiffs.

Tommy Thomas (*Sitpah Selvaratnam, Alan Gomez* and *Roselle Wong* with him) (*Skrine & Co*) for the first defendant.

Lambert Rasaratnam (*Brendan Siva* with him) (*Lee Hishamuddin*) for the second and third defendant.

Cur Adv Vult A

Abdul Wahab J: The plaintiffs (Repco) filed a writ of summons on 12 April 1999 against the first, second and third defendants for certain declarations against the defendants, and various claims for damages, injunctions, interest and costs. The brief facts of the case is that Repco had taken considerable borrowings from Sime Bank Bhd ('the bank'). The B assets of the bank were taken over by the first defendant under the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Act'). The first defendant appointed the second and third defendants as special administrators. On 15 April 1999, the defendants filed their appearances to the writ and summonses in chambers ('the applications') to set aside the writ of summons under O 18 r 19 and O 15 r 6(2) of the Rules of the High C Court 1980 and the inherent jurisdiction of the High Court. The learned senior assistant registrar heard and rejected the application. The defendants appealed. Order 56 rule 1 provides such an appeal lies to the judge in chambers. It is established law that such an appeal is not an appeal in the same sense as appeals from the judgements, decisions or orders of the subordinate courts, but is a rehearing: *Tuan Haji Ahmed Abdul Rahman v* D *Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 (FC). That being the case, I shall proceed directly to the applications.

The applications are also made under O 92 r 4 and O 15 r 6(2). It is trite that a court would be very reluctant to resort to inherent jurisdiction where there are other adequate provisions. O 15 r 6(2) applies to misjoinder E of parties. Since the validity of the purported exercise of the power of the first defendant and the special administrators are challenged, an objection on this ground is at best debatable. Further since O 15 r 6(1) itself provides that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, it would be wrong to strike out the proceedings in this case under O 15 r 6(2). F

The O 18 r 19 application are founded upon the argument that pursuant to s 33(1) of the Act, the directors of the plaintiffs could no longer, after the appointment of the special administrators, commence this action in the name of the plaintiffs without the latter's prior written consent, and the proceedings ought therefore be struck out. As set out earlier, this G objection clearly is no basis for striking out the writ under O 15 r 6(2) in view of the specific provision of O 15 r 6(1).

As an application under O 18 r 19, it is best to remind ourselves first of the law relating to it. The rule itself provides:

> 19 Striking out pleadings and indorsements (O 18 r 19) H
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> (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or I
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court;

A and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and
B a petition as if the summons or petition, as the case may be, were a pleading.

The approach to O 18 r 19 applications is well established. In *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC) it was held by Gopal Sri Ram JCA that there is no dearth of authority dealing with the
C approach that a court should take when exercising its summary jurisdiction under O 18 r 19. The unanimous view is that such drastic summary power ought not to be invoked save in a plain and obvious case. Where an examination of the record provided demonstrated that it was not such a case, and there were several issues of law that required mature consideration, including several issues of fact that were capable of
D resolution only after taking viva voce evidence, there was no justification for striking out the writ. In doing so he followed *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Bhd* [1993] 3 MLJ 36. In similar vein is another Federal Court case: *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 (FC). It is also said that it is a discretionary power to be exercised according to the justice of the case: *Muniandy s/o Subrayan*
E *& Ors v The Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557 (CA). The policy of O 18 r 19 RHC is to prevent the improper use of the court's machinery, and therefore in a proper case, a court will summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation: *Si & Si Sdn Bhd v*
F *Hazrabina Sdn Bhd* [1996] 2 MLJ 509 (SC).

Very briefly, the question we must answer then in this application is whether this is a case where the justice of the defendants' case is plain and obvious, or that the proceeding by the plaintiffs is an improper use of the court's machinery.

G It is argued by the defendants that the plaintiffs fall within the definition of 'affected person' as defined in s 21 in Part VI of the Act, and that the first defendant had acted according to Part VI in appointing the special administrators over the plaintiffs. On the other hand the plaintiffs contests the defendant's assertions relating to the basis of the actions of the first defendant and the appointment of the second and third defendants. Such
H factual dispute is difficult to resolve on affidavit evidence. Now O 18 r 19(2) provides that no evidence shall be admissible on an application under O 18 r 19(1)(a) as in this case. See also *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 (CA). Clearly the Rules of the High Court does not intend that contested issues of fact should be resolved by affidavit evidence in an application under O 18 r 19(1)(a) which is that the action
I discloses no reasonable cause of action. It is a principle fundamental to the system of adversarial litigation that evidence upon a disputed matter must be given on oath: *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd*

[1986] 1 MLJ 382 (SC). Where they are accepted, affidavits serve the purpose of putting on record undisputed evidence: *Kho Ah Soon v Duniaga Sdn Bhd* [1996] 2 MLJ 181 (FC). To a lesser extent it serves to give notice. To put it another way, the summary procedure based upon affidavit evidence such as in O 18 r 19 is to be applied to situations where the underlying facts are agreed or not in dispute, and the matter is purely a question of interpretation of the facts and law.

The writ of summons sought to be set aside is indorsed clearly with claims for declarations, damages, accounting and injunctions, interest and costs, founded upon assertions that statutory requirements and criteria have not been complied with for the actions of the first defendant and the appointments of the second and third defendants. There are allegations of bad faith and fraudulent exercise of power, as well as assertions of breach of arts 5(1) and 13 of the Federal Constitution. All of these are denied. There are clearly triable issues in the form of factual disputes in this case and O 18 r 19 cannot apply.

In this case the first defendant acted under s 24 which provides:

> 24(1) Subject to s 25, the corporation may recommend to the oversight committee the appointment of a special administrator of an affected person, if the corporation is satisfied that the affected person —
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> (a)is unable or likely to be unable to pay its debts; or
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> (b) is unable or likely to be unable to fulfil its obligations to its creditors.
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> (2) The corporation may, with the written approval of the oversight committee, appoint the special administrator.
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> 25 The corporation may recommend the appointment of a special administrator under s 23 or 24 if the corporation is satisfied that it would serve public interest to do so or one or both of the following purposes could be achieved:
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> (a) the survival of the affected person and the whole or any parts of its assets as a going concern;
>
> (b) a more advantageous realisation of the affected persons assets would be achieved than on a winding up.

The definition of 'affected person' appears not, as Mr T Thomas himself points out, in the usual interpretation section, but separately in Part VI of the Act, where it is defined in s 21:

> 21 In this Part, unless the context otherwise requires —
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> 'affected person' means —
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> (a) any company owing a duty or obligation under a credit facility to the corporation or any subsidiary of the corporation, whether present or future, or whether vested or contingent; or
>
> (b) a subsidiary of the company referred to in para (a) who has provided security for the performance of or discharge of the duty or obligation of the company; or
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> (c) a subsidiary of the company referred to in para (a) whose share capital has been charged, pledged or mortgaged by the company to

A secure the performance of or discharge of the duty or obligation of the company.

Read with s 24, the Act would on the face of it authorise the appointment of special administrators over borrowers from financially distressed companies.

B On the other hand the preamble states that the Act is:

> An Act to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by the corporation, the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by the corporation and for matters connected therewith or incidental thereto.

C

The special administrators are thus intended by Parliament to be appointed to administer and manage persons whose assets or liabilities have been acquired by the corporation such as, in the case, Sime Bank Bhd. This is followed, consistently, in the recitals to the Act, which states:

D

> Whereas special provisions are required in the public interest to assist financial institutions by removing impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises and to promote the revitalisation of the nation's economy by injecting liquidity into the financial system, such goals to be achieved through the acquisition, management, financing and disposition of assets and liabilities:

E

> And whereas legislation is the only means by which the acquisition, management, financing and disposition of assets and liabilities can be implemented promptly, efficiently and economically for the public good:

> And whereas legislation is the only means by which special administrators may be appointed expeditiously to administer and manage persons whose assets or liabilities have been so acquired:

F

It may be concluded from the preamble and the recitals that the Act is to provide special provisions to assist financial institutions by removing impaired assets and to assist the business sector 'by dealing expeditiously with financially distressed enterprises' and is the means by which special administrators may be appointed 'to administer and manage persons whose
G assets or liabilities have been so acquired'. In other words, the Act is to deal with financially distressed enterprises being assisted by the first defendant by acquiring their assets and liabilities, and this is sought to be achieved by the appointment of special administrators to administer and manage the assets and liabilities of such assisted financially distressed enterprises.

H The plaintiffs have raised certain questions that merit further consideration. Firstly, such actions and appointments by the first defendant are themselves subject to pre-conditions set out in these sections. Compliance by the first defendant with these conditions have been challenged in the writ. Secondly, on issues of meaning of certain provisions of the Act. This, upon consideration, is not a frivolous as it might first
I appear to be. The Act has quite unusually but carefully set out its intent and purpose, that is to assist financially distressed enterprises, but s 24 appears to have proceeded beyond financially distressed enterprises to borrowers

from such enterprises, over which special administrators may be appointed without prior consultation so long as the first defendant is satisfied it: (a) is unable or likely to be unable to pay its debts; or (b) is unable or likely to be unable to fulfil its obligations to its creditors; and the first defendant is also satisfied that it would serve the public interest or achieve the survival of the affected person and the whole or any part of its assets or a more advantageous realisation of the assets would be achieved than on a winding up. It raises the question whether the s 21 definition of an 'affected person' applies in s 24 or does the context require otherwise. Alternatively, if the definition applies, then whether the appropriate criteria had been applied. Thirdly, the plaintiffs have questioned whether these provisions breached their constitutional rights under arts 5 and 13 of the Federal Constitution. Consideration may have to be given as to whether such questions ought to be referred to the Federal Court by way of case stated under s 84 of the Courts of Judicature Act 1964. Certainly, the length and scope of submissions underline that there are questions of fact that need to be tried, and legal issues that require careful consideration and cannot be summarily dismissed under O 18 r 19.

I would therefore agree with the decision of the learned senior assistant registrar. I therefore dismiss the appeal and the applications by the defendants and confirm the order of the learned senior assistant registrar.

Appeal dismissed.

Reported by Moy Saw Han